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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. RICHARD ANTHONY ROBLES, Defendant and Appellant.	B206855 (Los Angeles County Super. Ct. No. KA080451)

APPEAL from a judgment of the Superior Court of Los Angeles County. Bruce F. Marrs, Judge. Remanded in part; affirmed in part.

Valerie G. Wass, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, James William Bilderback II and Alene M. Games, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Richard Robles was convicted, following a jury trial, of one count of transportation of methamphetamine in violation of Health and Safety Code section 11379, subdivision (a), one count of possession of methamphetamine in violation of Health and Safety Code section 11378 and one count of resisting a peace officer in violation of Penal Code[1] section 148, subdivision (a)(1). The jury found true the allegations that appellant committed the current offenses for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b)(1)(A) and was on bail within the meaning of section 12022.1. Appellant admitted that he had suffered a prior felony conviction within the meaning of sections 667, subdivisions (b) through (i) and 1170.12 and served a prison term for that conviction within the meaning of section 667.5.

Appellant appeals from the judgment of conviction, requesting that we review the sealed transcript of the in camera hearing on his *Pitchess* motion and contending that there is insufficient evidence to support the jury's true finding on the section 186.22 gang allegation, and that the trial court abused its discretion in refusing to strike the gang enhancement and erred in staying rather than striking two section 667.5 enhancement terms. We remand this matter to the trial court to strike or impose the section 667.5 enhancement based on case number KA035613. We affirm the judgment of conviction in all other respects.

Facts

On September 6, 2007, about 10:30 p.m., Baldwin Park Police Officers Frank Segura and Noe Cervantes observed a blue Honda Accord fail to stop at a stop sign. The officers activated the lights and sirens on their patrol car. They saw the car's driver, Maurice Granado, look in the rearview mirror. Granado continued driving. He failed to stop at several stop signs. Eventually, he pulled into a driveway at 811 Frazio Street.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

Appellant got out of the car and headed toward the back of the property. Officer Segura ordered appellant to stop. Appellant continued to flee. He tossed a gray pouch and some white objects over a chain-link fence. Appellant then turned and ran back toward the front of the property. He ran toward Officer Cervantes, with his body in a "tackling" position. The officer kicked him in the shoulder and they both fell to the ground. Appellant was handcuffed and taken to a patrol car.

In the meantime, several people came out of the house. Officers later learned that the house belonged to Granado's mother. The people heckled the officers, who then called for back-up.

Officer Segura retrieved the gray pouch which appellant had thrown away. It contained several baggies of a substance later determined to be 10.26 grams of methamphetamine. The pouch also contained a small amount of marijuana. Appellant had $152 in cash on his person, Granado $1,943.

At trial, Baldwin Park Police Officer Mark Adams testified that 811 Frazio was in territory claimed by the Eastside Bolen Parque gang. Both appellant and Granado had admitted to police in the past that they were members of that gang. In Officer Adams's opinion, appellant was an active gang member.

Officer Gary Breceda and Officers Segura and Cervantes testified about an arrest of appellant in June 2007. On that occasion, Officers Cervantes and Segura stopped a pick-up truck to give the driver a fix-it ticket. Appellant was in the passenger seat, with his hands inside his waistband. Officer Breceda told appellant to remove his hands. When he did not comply, Officer Cervantes kicked appellant on the shoulder to dislodge his hands. Appellant pulled out a baggie, tore a hole in it and tossed the white powdery contents out the driver's door. It was stipulated that the baggie contained almost 25 grams of methamphetamine.

Appellant testified in his own defense at trial. He stated that he was 36 years old and had lived in Baldwin Park his entire life. He had joined the Eastside Bolen Parque gang when he was young, but he stopped being a gang member in 2002. He was now married with children and made a living working on oil rigs.

On September 6, 2007, he was riding with Granado in Granado's car, going to Granado's mother's house. Granado stopped at a stop sign, then inched forward to check traffic. When Granado saw the patrol car's lights, he pulled into the driveway. Appellant was afraid because he was out on bail. He tried to run inside the house, but put his hands up as soon as the officer told him to get on the ground. As he was trying to get on the ground, the officer kicked him to the ground. Later, after he was handcuffed, Officer Campa pulled out a bag of drugs and tried to put it in appellant's pocket.[2]

Appellant called Rosa Sandoval, who lived near Granado's mother's house, as a witness. She testified that she saw appellant get out of the car and run toward some trash cans. An officer told appellant to stop. Appellant laid down on the ground. She heard appellant telling the officers to stop beating him, but she did not see anyone hitting appellant. Sandoval told her daughter to get a camcorder and record the incident. Sandoval saw officers search the area, but they did not appear to find anything. The video tape made by Sandoval's daughter was played for the jury.

Discussion

1. *Pitchess* motion

Appellant requests that this Court conduct an independent review of the in camera proceedings done by the trial court in response to appellant's *Pitchess* motion for discovery of peace officer personnel records.

When requested to do so by an appellant, an appellate court can and should independently review the transcript of the trial court's in camera *Pitchess* hearing to determine whether the trial court disclosed all relevant complaints. (*People* v. *Mooc* (2001) 26 Cal.4th 1216, 1229.)

We have reviewed the record of the *Pitchess* motion in this case and find it adequate to permit meaningful appellate review. There is a full transcript of the in

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[2] Appellant had been convicted in 2002 for threatening Officer Campa.

camera hearing, including a description of the documents provided by the custodian of records. We have also independently reviewed that transcript and see no error in the trial court's rulings concerning disclosure.

2. Sufficiency of the evidence

Appellant contends that there is insufficient evidence to support the true finding on the section 186.22 gang allegation.

In reviewing the sufficiency of the evidence, "courts apply the substantial evidence test. Under this standard, the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses *substantial evidence* - that is, evidence which is reasonable, credible, and of solid value - such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People* v. *Cuevas* (1995) 12 Cal.4th 252, 260-261, internal quotation marks and citations omitted.)

"Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder." (*People* v. *Jones* (1990) 51 Cal.3d 294, 314, internal citations omitted.)

The standard of review is the same when the prosecution relies on circumstantial evidence to prove guilt. (*People* v. *Rodriguez* (1999) 20 Cal.4th 1, 11.) "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment." (*People* v. *Thomas* (1992) 2 Cal.4th 489, 514, internal quotations omitted, citing *People* v. *Bean* (1988) 46 Cal.3d 919, 932-933.)

Appellant's first contention is that there is no substantial evidence that he or Granado were gang members at the time of the offense.

We see substantial evidence of appellant's gang membership. Appellant acknowledged that he joined the Eastside gang in high school and had a tattoo for that gang. The prosecution presented additional direct, circumstantial and opinion evidence which showed that appellant was still an active gang member at the time of his arrest in this case.

The prosecution offered the testimony of two Baldwin Park police officers showing that appellant had admitted being an Eastside gang member after he got out of prison. Officer Segura testified that the first time that he heard appellant admit to being a gang member was during an arrest in 2002 or 2003 for possession of weapons. Appellant was arrested in February 2002 and convicted in March of that year, so it is reasonable to understand Officer Segura's contact as referring to an incident after appellant got out of prison. Officer Adams testified that appellant admitted that he was an Eastside gang member during a "recent" traffic stop which the officer believed occurred in 2006.

The prosecution also offered the expert testimony of Officer Adams, who opined that appellant was an active gang member in 2007 based on his admissions *and* appellant's continued association with Eastside gang members and continued residence in Eastside gang territory. The officer explained that Hispanic gangs such as the Eastside gang view membership as a life-time commitment and members who drop out do not remain in gang territory and associate with gang members.[3]

Appellant testified at trial that he quit being an active member in 2002, after he got out of prison, started a family and got a well-paying job working on oil rigs. He points out that evidence at trial showed his police contacts during the period from 2002 to 2007 were minimal. For example, appellant points out that Officer Cervantes testified that he did not have any gang-related contact with appellant during the year-and-a-half that the officer had been working in the Baldwin Park gang unit, and that Officer Breceda had

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[3] He also based his opinion on police reports written by Baldwin Park police officers over the years which documented that appellant had admitted to them that he was an Eastside gang member. Officer Adams did not provide any dates for these reports.

been a police officer for 13 years but had had no contact with appellant prior to appellant's June 2007 arrest. He contends that these minimal contacts were not consistent with being an active gang member.

"Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts." (*People* v. *Maury* (2003) 30 Cal.4th 342, 403.)

We also see substantial evidence that Granado was an active Eastside gang member at the time of the crimes in this case.

The prosecution presented direct, circumstantial and opinion evidence showing that Granado was an Eastside gang member. Officer Segura testified that in the past, Granado had admitted to him that he was an Eastside gang member.[4] Officer Adams opined that Granado was an active Eastside gang member in 2007. The officer also opined that one joins a Hispanic gang for life, and that members who left that gang would not continue to live in gang territory. Granado still lived in Eastside territory. This evidence is sufficient to support a finding that Granado was an active gang member.

Appellant is correct that there is evidence to the contrary. Appellant testified that Granado was 50 years old and not an Eastside gang member. He argued that even if Granado had been a gang member when younger, it was highly unlikely that Granado was still an active gang member at the age of 50.[5]

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[4] At the time of trial in 2008, Segura had only been an officer for eight years, and a gang officer for two years, so the admission necessarily occurred within the last eight years, and more probably within the last two years.

[5] As appellant acknowledges on appeal, the police report showed that Granado was 47. It was appellant who testified that Granado was 50. Granado did not testify at trial.

As we discuss above, it was the jury's task to decide whether to believe appellant or the officers. "Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment." (*People* v. *Maury, supra,* 30 Cal.4th at p. 403.)

Appellant's second contention is that there is insufficient evidence to show that his crimes were committed with the specific intent to benefit the Eastside gang.

Appellant committed the crime in this case in association with Granado, an Eastside gang member. When arrested, he was in territory claimed by the Eastside gang. Officer Adams, a gang expert, testified that drug sales were a large part of the activity of the Eastside gang. Officer Adams also explained that profits from drug sales are used by Hispanic gangs to pay the Mexican Mafia, to purchase weapons for gang members, to buy more narcotics to keep the business going, and for a show of wealth by gang members to recruit new members. Based on these facts, Officer Adams opined that the crime in this case was committed for the benefit of the Eastside gang.

Appellant contends that Officer Adams's opinion was simply speculation based on generalized knowledge of gang culture. Appellant bases his contention in large part on his earlier contention that he and Granado were not active gang members. As we discuss, *supra*, there is sufficient evidence to support a finding that both men were active gang members.

Appellant also contends Officer Adams was speculating because there is no evidence connecting the crime and the Eastside gang. Appellant overlooks the fact that the men were in territory claimed by the Eastside gang, when they were stopped by police. Officer Adams testified that drug sales were a large part of the criminal activity of the Eastside gang. He also testified that the gang marked their territory and sought to instill fear into the community and show that they own the territory. This creates a reasonable inference that appellant and Granado were working on behalf of the Eastside gang or that the sale of drugs benefitted the Eastside gang.

Appellant's third and last contention is that there was no evidence that the crime in this case was committed with the specific intent to further other criminal conduct by gang members. This contention is premised on the holding of *Garcia* v. *Carey* (9th Cir. 2005)

395 F.3d 1099. In that case, the court affirmed the district court's granting of habeas relief as to the gang enhancement because the record did not "'support an inference that [the defendant] robbed [the victim] in order to facilitate other gang related criminal operations within [the community].'" (*Id*. at p. 1103.)

"'[F]ederal decisional authority is neither binding nor controlling in matters involving state law.'" (*Nagel* v. *Twin Laboratories, Inc*. (2003) 109 Cal.App.4th 39, 55.) We do not find the reasoning in *Garcia* persuasive. There is no requirement in section 186.22, subdivision (b), that the defendant's intent to assist criminal endeavors by gang members must relate to criminal activity apart from the offense being committed. To the contrary, the specific intent required by the statute is "to promote, further, or assist in *any* criminal conduct by gang members . . . ." (Pen. Code, § 186.22, subd. (b)(1), italics added.)

We agree with our colleagues in the Third District Court of Appeal and Division Four of this District Court of Appeal that *Garcia's* interpretation of California law is incorrect. (*People* v. *Hill* (2006) 142 Cal.App.4th 770, 774; *People* v. *Romero* (2006) 140 Cal.App.4th 15, 19.) We see no requirement that the defendant intend to assist criminal activity by the gang in addition to the charged offense.

3. Gang enhancement

Appellant contends that the trial court abused its discretion in refusing to strike the section 186.22 gang enhancement.

Section 186.22, subdivision (g) provides: "Notwithstanding any other law, the court may strike the additional punishment for the enhancements provided in this section or refuse to impose the minimum jail sentence for misdemeanors in an unusual case where the interests of justice would best be served, if the court specifies on the record and enters into the minutes the circumstances indicating that the interests of justice would best be served by that disposition."

When determining whether a dismissal will further the interests of justice, the trial court must consider both the constitutional rights of the defendant and the interests of

society, as represented by the prosecution. (*People* v. *Garcia* (1999) 20 Cal.4th 490, 497-498.) A trial court's refusal to strike an enhancement is reviewed for an abuse of discretion. (See *People* v. *Jordan* (1986) 42 Cal.3d 308, 316.)

Appellant contends that the trial court should have stricken the enhancement because the evidence of gang activity was very weak, the underlying crimes were "victimless, nonviolent crimes" which did not involve a large quantity of drugs, appellant had the support of family and friends, had a wife and two young children to support, had suffered the death of his six-month old son from SIDS in January 2007, had no prior convictions for gang offenses or gang enhancements, and does not have a lengthy or violent criminal history. Appellant points out that he was 35 years old at the time of sentencing and would not be likely to reoffend if he were sentenced to 13 years in prison rather than the lengthier 16 year term resulting from the gang enhancement. He also contends that it appears that his criminality was the result of a personal struggle with drug addiction.

The trial court did consider the factors mentioned by appellant, but concluded that they did not warrant striking the gang enhancement. The trial court explained: "The factors cited by [appellant's attorney] are certainly worthy factors and should be considered." We see no abuse of discretion in this decision.

As the trial court pointed out, appellant did have a serious criminal record. Even assuming that appellant led a crime-free life between 2002 and 2007, there was strong evidence that he had resumed his life of crime. Appellant was out on bail after being arrested on a previous drug sales charge when he was arrested in this case. His ties with the Eastside gang were strong enough that he could bring salable quantities of drugs into their territory. The drugs in his possession were packaged for sale, the quantity was larger than would be expected for personal consumption and there was no paraphernalia in the car for consumption of the drugs. The trial court did not abuse its discretion in finding that this was not "an unusual case where the interests of justice would best be served" if the enhancement were stricken.

In his reply brief, appellant contends that the trial court was not aware that it had discretion to strike the allegations in the interests of justice, but believed that it could only dismiss the enhancements if the evidence was insufficient. We see no merit to appellant's claim. The trial court clearly stated: "I certainly have the power to strike or stay the sentence. Certainly if it was legally insufficient, I would dismiss it outright." The court's statement distinguishes between situations where the evidence is legally insufficient and so the allegation is dismissed outright and other situations in which the allegation may be stayed or stricken. The only reasonable understanding of this statement is that it shows the court's awareness that it had the power to stay or strike (rather than "dismiss outright") the allegation when the allegation was supported by sufficient evidence.

4. Section 667.5, subdivision (b) enhancements

Appellant contends that the trial court erred in staying rather than striking his two one-year enhancement terms under section 667.5, subdivision (a)(1). We agree in part.

The same underlying conviction in case number KA055915 was used to support both an allegation pursuant to section 667, subdivision (a) and one pursuant to section 667.5, subdivision (a)(1). The trial court imposed the section 667 enhancement and imposed but then stayed the section 667.5 enhancement pursuant to section 654. This enhancement should have been stricken. Section 667.5 enhancements should be stricken rather than stayed pursuant to section 654. (See *People* v. *Jones* (1993) 5 Cal.4th 1142, 1150.)

Appellant admitted that he had suffered another conviction resulting in a prison term within the meaning of section 667.5, in case number KA035613. There is nothing in the record to indicate that the conviction in case number KA035613 was used to support any other enhancement allegation. Thus, this second section 667.5 enhancement does not appear to be barred by section 654. There is also nothing in the record to indicate the trial court's reason for staying this enhancement. Appellant contends that the court did not intend to impose any more time. That is not clear from the record.

Accordingly, we remand this matter to the trial court to strike or impose the section 667.5 enhancement.

Disposition

The matter is remanded to the trial court to strike or impose the section 667.5 enhancement based on appellant's conviction in case number KA035613 and to strike the section 667.5 enhancement based on his conviction in case number KA055915. The clerk of the superior court is instructed to prepare an amended abstract of judgment reflecting the trial court's action on this issue and to deliver a copy to the Department of Corrections and Rehabilitation. The judgment is affirmed in all other respects.

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ARMSTRONG, J.

We concur:

TURNER, P. J.

MOSK, J.